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Constitutional Law--Gaming Devices--Public Policy--When Court May Determine

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STUDENT NOTES AND RECENT CASES

CONSTITUTIONAL LAW—GAMING DEVICES—PUBLIC POLICY —WHEN COURT MAY DETERMINE.—The West Virginia court recently held that "a statute requiring a license tax of one operating a gaming device prohibited by law is invalid and unenforceable, as against public policy."[1] *Quaere*: to what extent may the courts determine what is public policy?

Older writers believed that judges did not legislate at all.[2] Today there is danger of the other extreme—that the law consists of the rules which the courts enforce and that the courts are the real makers and creators of the law.[3] Of course, the power to declare the law carries with it the power to make the law when none exists.[4] The common law is and always has been the law of the courts.[5]

It is an elementary principle that neither of the three departments of our government is inferior to the others and that they are separate and coordinate. The Constitution, however, did establish a fundamental law and the courts are bound by it.[6] The legislature has the inherent power to formulate rules for conduct of persons within its jurisdiction so long as its enactments do not conflict with the fundamental laws, and a court which is bound by a fundamental law must enforce the law as such.[7]

"Obscurity of statute or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function."[8] But where the legislature has passed a statute, and if it does not contravene the fundamental law, is a court justified in invalidating it? Numerous cases have settled this point. Where a statute does not violate the federal or state constitution, the legislative will is supreme and its policy is not subject to review by the courts whose

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[1] Thompson *v.* Hall, 138 S. E. 579 (W. Va. 1927).
[2] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 124.
[3] Pope, "Fundamental Law and the Power of the Courts," 27 HARV. L. REV. 45.
[4] *Supra*, n. 2.
[5] *Supra*, n. 3.
[6] Marbury *v.* Madison, 1 Cranch (U. S.) 137 (1803).
[7] *Idem.*
[8] CARDOZO, *supra*, n. 2, p. 128.

province is not to regulate but to effectuate the policy of the law as expressed in valid statutes.[9] The justice or injustice of statutory provisions is a question for the legislature, and the courts will not declare a statute invalid because in their judgment it may be unwise or detrimental to the best interests of the state.[10] A legislative act, if constitutional, declares in terms the policy of the state. The courts are not at liberty to declare a law void as in violation of public policy.[11] As stated by Parke, B.: "It is the province of the statesman and not of the lawyer to discuss and of the legislature to determine what is best for the public good and provide for it by proper enactments. It is the province of the judge to expound the law, to declare public policy as he finds it in the written and unwritten law."[12]

What is "public policy"? A survey of cases shows that it is a variable term[13] and that it varies with the habits and fashions of the day.[14] The ultimate sovereignty in our government consists of the will of the people who form the government. As long as this ultimate sovereignty does not partake of a character which is revolutionary, it expresses itself in accordance with the laws of the land: this is called constitutional government. Public policy is not to be measured by the private convictions or notions of the individual judge.[15] The Virginia Court[16] said that public policy is wholly unreliable as a basis for judicial decision. Like "natural law," it seems to be a catch-all for judicial decision when courts can find no other reasoning.

Undoubtedly back of the process of formulated legislative policy is the force of public opinion, which is generally not the opinion of a numerical majority but rather that of an effective minority.[17] Individuals become interested in laws, in the main, when they become affected by them. Sunday Laws are enforced in some communities, because

[9] Davis *v.* Fla. Power Co., 64 Fla. 246, 60 So. 759 (1913); People *v.* Tompkins, 186 N. Y. 413, 79 N. E. 326 (1906).
[10] McCray *v.* U. S., 195 U. S. 27 (1904); Bangor *v.* Pierce, 106 Me. 527, 76 Atl. 945 (1910).
[11] Red "C" Oil Mfg. Co. *v.* Board of Agr., 222 U. S. 380 (1912); Board of Commissions *v.* Diamond Ice Co., 130 Ia. 603, 105 N. W. 203 (1905).
[12] Egerton *v.* Brownlow, 4 H. L. Cas. 122.
[13] Gordon *v.* Gordon Admrs., 168 Ky. 409, 182 S. W. 220 (1916).
[14] Brown *v.* Speyers, 20 Gratt. (Va.) 296 (1871).
[15] Picket Pub. Co. *v.* Board of Com., 36 Mont. 188, 92 Pac. 524 (1907).
[16] Boynton *v.* McNeal, 31 Gratt. (Va.) 464 (1879).
[17] LOWELL, PUBLIC OPINION AND POPULAR GOVERNMENT, ch. 1.

public opinion demands it; while in other communities, often in close proximity, they are unenforced because of indifference or because the public welfare requires it. The *mores* of the day change the reason. No longer are Sunday Laws enforced because of religious reasons but rather because they are necessary for both the physical and moral nature of men.[18] The 18th Amendment but a few years ago expressed public opinion as to prohibition. Today it is problematical if the numerical majority favor it. "Where there is no statute judicial legislation does, and should, keep its doctrines up to date with the *mores* by continual restatement and by giving them a continually new content."[19] But it is different where the rule has been established by legislative enactment. Suppose, for instance, that a statute defines murder, and then excuses the killing when done to atone the violation of the chastity of the female members of the family: would this not be a regulation of manslaughter? Would the court have the power to nullify this exception in the statute as being contrary to public policy?[20]

In the recent West Virginia case, the statute[21] under discussion provided for the issuance of a license on *punch boards* and expressly provided that no license or payment therefor "shall be taken to legalize any act which would otherwise be in violation of the law."

Assuming that the intention of the Legislature was to tax an illegal act, can the court say that such an intention is against public policy and that therefore the tax itself is void?

In the License Cases, where Congress authorized a tax on liquor business in prohibition states the Supreme Court said:

> "This court cannot amend or modify any legislative acts, examine questions as expedient or inexpedient, as politic or impolitic * * * * . The legislature has thought fit, by enactments clear of all ambiguity, to impose penalties for unlicensed dealing in lottery tickets and in liquor. These enactments so long as they stand unrepealed and unmodified, express the public policy in regard to the subjects of them. The proposition that they are contrary

[18] Hennington v. Georgia, 163 U. S. 299 (1896).
[19] Corbin, 29 YALE L. J. 771.
[20] Olliphant, 65 CENT. L. J. 142.
[21] CODE, ch. 32, §1.

> to public policy is a contradiction in terms, or it is intended as a denial of their expedience or their propriety * * * * * . These licenses give no authority. They are mere receipts for taxes."[22]

In a recent case[23] where the defendants contended that the laws of the State of Washington declare the public policy of the state, and since the sale of intoxicating liquor is prohibited, the government of the United States would not issue a permit or license in contravention of this law, becoming thereby a party to the violation, the court said:

> "Comp. Stat. §5966 declaring the offense of engaging in the liquor business without having paid required revenue tax, which payment shall not authorize the business in any state contrary to its law, is applicable in a prohibition state."

But, while a statute which imposes a license tax upon a particular form of gaming generally has the effect of legalizing that form of gaming upon the payment of the tax imposed, a statute will be construed to legalize gaming only when that is its reasonable or natural intendment.[24] But, in a Texas Case by express legislation the keeping or exhibiting a table for purpose of gambling notwithstanding such table may be licensed by law and license tax paid, is an offense against the law of Texas.[25]

Cooley, J. said: "The idea that the state lends its countenance to any particular traffic by taxing it, seems to rest upon a very transparent fallacy. * * * * Taxes are not favors; they are burdens; * * * * Yet when the keeper of billiard tables is compelled to pay a tax, it can be no defense to him, either in law or in morals, that he is compelled to do so from the profits of an illegal business. To refuse to receive the tax under such circumstances would tend to encourage the business, instead of restraining it; and would tend to defeat the state policy which forbids games of chance * * * * . If it were to act upon the idea of refusing to derive a revenue from such sources, it ought to decline to receive fines for criminal offenses with the

[22] License Tax Cases, 5 Wall. (U. S.) 462 (1866).
[23] U. S. *v.* Lazzaro, 225 Fed. 237 (1918).
[24] 4 Ann. Cas. 575; State *v.* Duncan, 16 Lea (Tenn.) 79 (1885); Hawkins *v.* State, 33 Ala. 433 (1859).
[25] Reeves *v.* State, 12 Tex. App. 199 (1882); Parker *v.* State, 13 Tex. App. 213 (1882).

same emphasis that it would refuse to collect a tax from an obnoxious business * * * * *. If the tax is imposed on the thing which is prohibited, the tax law instead of being inconsistent with the law declaring the illegality is in entire harmony with its general purpose and may sometimes be even more effectual."[26] That a business which is prohibited may be taxed has been held by both state courts[27] and very recently by the United States Supreme Court's decision that the income of a bootlegger could be taxed.[28]

The legislature legalized no act; its provisions were punitive and pecuniary; therefore, it is difficult to see how any public policy has been violated. The court believed that the licensing of these gaming devices "had increased rather than diminished the pernicious practice, because in many instances, if not as a general rule, the criminal law is not enforced against the operators of gaming devices holding licenses." It is doubtful if, through practical experience, this statement can be substantiated. Certainly it is unreasonable that one should violate the gaming device law because the state has placed an additional penalty in way of a license. The fact is true, as the court pointed out, that violators are not prosecuted. But is that the fault of the license law—the statute in question—or is it due to the fact that local prosecuting attorneys and other public officials, empowered with the right and duty to enforce the law, are not performing their duty? It requires no interpretation to see that the statute did not legalize any gambling act; and if public officers have, in the past "winked" at violations of this kind, what assurance do we have that this "winking" will cease because the court has improperly legislated judicially that the statute is invalid and inoperative? Unless some action is taken by local officers, the evil will continue, public policy will be violated, in some instances public opinion satisfied, and the state will be deprived of a source of revenue.

It should be pointed out that the result of *Thompson* v. *Hall* could be sustained on the theory that the plaintiff, operating an illegal device, did not come into a Court of Equity

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[26] Youngblood *v.* Sexton, 32 Mich. 406 (1875).
[27] Palmer *v.* State, 88 Tenn. 553, 13 S. W. 233 (1890); Blaufield *v.* State, 103 Tenn. 593, 53 S. W. 1090 (1899).
[28] U. S. *v.* Sullivan, 47 Sup. Ct. Rep. 607 (June, 1927).

with clean hands. In announcing that the legislature had violated the public policy of the State, it seems that the Court has not discriminated between the functions of the legislative and judicial departments.

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FUTURE INTERESTS—A FEE LIMITED UPON A FEE BY DEED —HEIR CONSTRUED AS HEIR OF THE BODY.—The grantors by deed granted land to their daughter Laura, with a limitation that should Laura die without an heir, the land to be equally divided between James and William, sons of the grantors. After conveying to her sister, Laura died. The heirs of James and William brought ejectment against the sister. *Held,* the limitation over to James and William was valid. Laura took a qualified fee determinable upon her death without heirs of the body then living. *Kidwell* v. *Rogers,* 137 S. E. 5 (W. Va. 1927).

At early common-law a fee could not be limited upon a fee. The only kinds of future interests that could be created were in the form of remainders, and any limitation operating to shift the seisin otherwise than as a remainder expectant upon the determination of the preceding estate was void. This rule, the common-law doctrine of repugnancy between two estates, was founded upon the assumption that the conveyance of the fee was the conveyance of the whole, and after the whole was given there was nothing beyond that left to give. However, with the passage of the statute of uses and the statute of wills, the possibilities of the creation of future estates were greatly enlarged. Limitations after a fee by way of springing and shifting uses came to be recognized. Ulterior estates were permitted to be created to arise upon the defeasance of prior estates in the same property, contrary to the strict rules of the early common-law. *Pells* v. *Brown,* 3 Cro. Jac. 590, introduced into the law the novel idea of indestructible contingent future interests. This nondestructibility of such contingent future estates, created under the statute of uses, led to the growth of a new doctrine in the law of property, the so-called rule against perpetuities. The English and nearly all of the American authorities sustain the view of *Pells* v. *Brown,* and also hold that a gift over upon a definite